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In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT HAGEN, PETITIONER

v.

STATE OF UTAH

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF UTAH

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the provisions of the Act of May 27, 1902, ch. 888, 32 Stat. 245, and the Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, that relate to settlement of non-Indians on the Uintah Indian Reservation altered the boundaries of the Reservation to exclude the lands opened to non-Indian settlement under those Acts.

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INTEREST OF THE UNITED STATES

This case involves the boundaries of the Uintah Indian Reservation. The location of the boundaries affects the scope of the law enforcement obligations and powers of the United States under the Indian Major Crimes Act, 18 U.S.C. 1153, and other federal statutes that apply only in Indian country. Moreover, because of the United States' special relationship with the Indian Tribes, we have a strong interest in the development of sound principles for determining when a reservation has been diminished or extinguished.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Act of May 27, 1902, ch. 888, 32 Stat. 245, and the Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, are reprinted in an appendix to this brief.

STATEMENT

1. On October 3, 1861, President Lincoln established an Indian Reservation along a river in the Territory of Utah then known as the Uinta, but now referred to as the Duchesne.[1] Executive Order No. 38-1, *reprinted in* 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 900 (1904). Congress confirmed the President's action in 1864, providing that the land in question was "set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of [the Utah] territory as may be induced to inhabit the same." Act of May 5, 1864, ch. 77, § 2, 13 Stat. 63.

Before the end of the nineteenth century, however, the Uintah Indian Reservation—like many others—became the subject of the "familiar forces" brought to bear by "the desire of non-Indians to settle upon reservation lands." *DeCoteau* v. *District County Court*, 420 U.S. 425, 431-432 (1975). Those forces led to the passage in 1887 of the General Allotment Act, which granted the President authority "to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers, with the proceeds of these sales being dedicated to the Indians' benefit." *DeCoteau*, 420 U.S. at 432 (citing Act of Feb. 8, 1887, ch. 119, 24 Stat. 388).

The first significant step in the move toward allotment of the Uintah Indian Reservation came in 1894, when Congress directed the President to appoint a commission to negotiate with the Indians on the Reservation for the acceptance of allotments and "the relinquishment to the United States of the interest of said Indians in all [unallotted lands]." Act of Aug. 15, 1894, ch. 290, § 22,

[1] Another river now referred to as the Uinta is a tributary of the Duchesne that flows near the eastern boundary of the original Reservation before entering the Duchesne near the southeastern corner of the original Reservation.

28 Stat. 337.[2] Because the matter was not resolved promptly,[3] Congress in 1898 again directed the Secretary to appoint a commission to negotiate an agreement for allotment of Uintah Indian Reservation lands and "cession to the United States" of unallotted lands. Act of June 4, 1898, ch. 376, §§ 1-2, 30 Stat. 429. When the Indians resisted, Senator Rawlins of Utah introduced a series of bills that would have opened the Reservation unilaterally. S. 4867, 55th Cong., 3d Sess. (1898); S. 93, 56th Cong., 1st Sess. (1899); S. 145, 57th Cong., 1st Sess. (1902) (*reproduced in* S. Doc. No. 212, 57th Cong., 1st Sess. 3-4 (1902)); see S. Doc. No. 212, *supra*, at 4-6 (discussing resistance of Indians). Those bills, however, were not enacted.

Instead, in 1902, Congress passed an Act providing that if a majority of the adult male members of the Uintah and White River Indians consented, the Secretary of the Interior should make allotments by October 1, 1903, out of the Uintah Indian Reservation.[4] The allotments were to be in the amount of 80 acres to each head of a family and 40 acres to each other member of the Tribes. Act of May 27, 1902, ch. 888, § 1, 32 Stat. 263-264 (1902 Act). The 1902 Act also provided that

[2] In 1888, Congress had restored to the public domain a 7,040-acre triangle on the eastern edge of the Uintah Reservation, commonly referred to as the "Gilsonite Strip," because of the deposits of gilsonite found on that tract. Act of May 24, 1888, ch. 310, 25 Stat. 157-158. The status of the Gilsonite Strip is not at issue in this case.

[3] Negotiations with the Uintah Reservation Indians were delayed because of difficulties encountered in negotiating with the Indians on the neighboring Uncompahgre Reservation. See S. Doc. No. 32, 55th Cong., 1st Sess. 2-3 (1897).

[4] The Ute Indian Tribe participating as an amicus in this case includes the descendants of those Indians; it consists of the Uintah, Uncompahgre, and White River Bands of Indians. See Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation 1 (1937).

when the October 1, 1903, deadline for allotments passed, "all the unallotted lands within said reservation shall be restored to the public domain," and that those lands would be subject to entry under the homestead laws, at a rate of $1.25 per acre. 32 Stat. 263. Finally, the 1902 Act provided that the net proceeds of the sale of lands restored to the public domain, "under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians." 32 Stat. 264.[5]

The allotments did not, however, proceed as provided for by the 1902 Act. Accordingly, Congress in 1903 directed the Secretary to allot the land unilaterally if the Indians did not give their consent by June 1 of that year. Act of Mar. 3, 1903, ch. 994, § 1, 32 Stat. 997-998. That Act also extended the time for the "opening [of] the unallotted lands to public entry on said Uintah Reservation" until October 1, 1904. 32 Stat. 998. When the Indians continued to oppose the plan,[6] Congress again deferred the opening date, to March 10, 1905. Act of Apr. 21, 1904, ch. 1402, § 1, 33 Stat. 207-208.

By the Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048 (1905 Act), Congress again deferred the time for opening the unallotted lands to public entry, this time to September 1, 1905, unless the President determined that the lands should be opened at an earlier date. Section 1,

[5] A month later, Congress supplemented the 1902 Act with a provision requiring the Secretary,

> [i]n addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Rseervation in the State of Utah, * * * [to] select and set apart for the use in common of the Indians of that reservation such an amount of non-irrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.

J. Res. 31, 57th Cong., 1st Sess., 32 Stat. 744 (1902).

[6] Only 82 of the 280 adult male Indians eligible to vote approved the transaction. See H.R. Doc. No. 33, 58th Cong., 1st Sess. 5 (1903).

33 Stat. 1069. The March 1905 Act then specified "the manner of opening such lands for settlement and entry, and for disposing of the same." *Ibid.* Specifically, it provided that the unallotted lands (except for such tracts as might be set aside as a national forest service, and certain mineral lands disposed of in 1902) "shall be disposed of under the general provisions of the homestead and townsite laws of the United States." *Ibid.*[7] All lands "opened to settlement and entry under this Act remaining undisposed of [within five years]" were to "be sold and disposed of for cash, under rules and regulations * * * prescribed by the Secretary of the Interior." 33 Stat. 1070. The proceeds of the sale of unallotted lands were to be applied, in accordance with the 1902 Act, for the benefit of the Indians. 1905 Act, § 1, 33 Stat. 1070.

The government failed to obtain the consent of the Indians to the arrangement. Nevertheless, President Roosevelt issued a Proclamation on July 14, 1905, which declared that "the unallotted lands in [the Uintah Indian] Reservation * * * will on and after the 28th day of August, 1905, * * * be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States." 34 Stat. 3120.[8]

[7] The 1905 Act also authorized the President, before opening the reservation to entry, to set aside additional lands for the Uintah Forest Reserve that had been established adjacent to the Reservation in 1897, as well as for reservoir and other water-supply purposes. 33 Stat. 1070.

[8] On the same day, President Roosevelt, acting pursuant to the 1905 Act, see note 7, *supra*, set aside about 1,010,000 acres within the Reservation as an addition to the Uintah Forest Reserve. 34 Stat. 3116. In 1931, Congress appropriated $1,217,221.25 to compensate the Indians for 973,777 acres of those lands, at the rate of $1.25 per acre. Act of Feb. 13, 1931, ch. 124, 46 Stat. 1092-1093. Congress compensated the Indians for the remainder of the forest reserve lands in 1956 by restoring to the Indians the title to the mineral resources on those remaining lands. Act of July 14, 1956, ch. 603, 70 Stat. 546. Pursuant to the 1905 Act, see note 7, *supra*,

2. In 1989, petitioner was charged with distribution of a controlled substance in the District Court of Duchesne County in Utah. The offense occurred in the town of Myton, which lies within the original exterior boundaries of the Uintah Indian Reservation, in an area that was opened to non-Indian settlement under the 1905 Act. Petitioner initially pleaded guilty. Before sentencing, however, petitioner filed a motion to arrest the judgment and to withdraw his guilty plea; he contended that the trial court did not have jurisdiction because he is an Indian and the crime had been committed in "Indian country" that is not subject to the jurisdiction of the State of Utah.[9] The trial court denied that motion, finding that petitioner is not an

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the President also withdrew certain lands for reservoir purposes, by proclamations issued on August 3 and August 14, 1905. 34 Stat. 3141-3143, 3143-3144. As to those lands, Congress in 1910 appropriated funds to pay the Indians $1.25 per acre, in return for which "[a]ll right, title, and interest of the Indians in the said lands [were t]hereby extinguished." Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285. The last major congressional action with respect to the Reservation came in 1948, when Congress "extended" the "exterior boundary of the Uintah and Ouray Reservation" to include a tract of approximately 510,000 acres, commonly referred to as the "Hill Creek Extension." Act of Mar. 11, 1948, ch. 108, § 1, 62 Stat. 72. The status of the forest reserve land, the reservoir land, and the Hill Creek Extension is not at issue in this case.

[9] The term "Indian country" is defined by 18 U.S.C. 1151 to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent." See *Oklahoma Tax Commission* v. *Sac and Fox Nation*, No. 92-259 (May 17, 1993), slip op. 8-11. As a general matter, a State has jurisdiction over an offense committed by or against an Indian in Indian country only where Congress has granted jurisdiction to the States—*e.g.*, in a special jurisdictional statute, see *Negonsott* v. *Samuels*, 113 S. Ct. 1119 (1993), or in Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-590, see *Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470 (1979). Utah has not acquired jurisdiction over the Indian country at issue here pursuant to either a special jurisdictional statute or Public Law 280.

Indian for purposes of principles governing state jurisdiction over crimes committed by or against Indians in Indian country. Pet. App. I; see Pet. App. A.

3. The Utah Court of Appeals reversed. *State* v. *Hagen*, 802 P.2d 745 (1990). The court of appeals noted that the Tenth Circuit has held that Myton and other areas opened to non-Indian settlement by the 1905 Act remain within the Uintah Indian Reservation. *Id.* at 747 (citing *Ute Indian Tribe* v. *Utah*, 773 F.2d 1087 (1985) (en banc), cert. denied, 479 U.S. 994 (1986)). The court also concluded that the State failed to introduce sufficient evidence in the trial court to justify a finding that petitioner is not an Indian. 802 P.2d at 747-748. Accordingly, the court reversed petitioner's conviction and ordered him discharged. *Id.* at 748.

4. The Utah Supreme Court granted the State's petition for a writ of certiorari and reversed the Utah Court of Appeals. Pet. App. A1. In a brief opinion, the court explained that it viewed the case as controlled by its decision the same day in *State* v. *Perank*, No. 860243 (July 17, 1992), *reprinted in* Resp. App. 4a-75a.[10] In *Perank*, the Utah Supreme Court concluded that the provisions of the 1902 Act and the 1905 Act opening lands to non-Indian settlement diminished the Uintah Indian Reservation and that the town of Myton accordingly lies outside the boundaries of the Reservation. See *id.* at 28a-63a. Relying on *Perank*, the Utah Supreme Court reinstated petitioner's conviction. Pet. App. A1.

SUMMARY OF ARGUMENT

A. This Court's decision in *Solem* v. *Bartlett*, 465 U.S. 463 (1984), establishes a clear-statement rule for resolution of claims that Congress has diminished the boundaries of an Indian reservation. Under that rule, an Act of Congress generally does not diminish a reservation unless the Act includes both "[e]xplicit reference to ces-

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[10] "Resp. App." refers to the appendix to the brief of respondent in support of the petition.

sion or other language evidencing the present and total surrender of all tribal interests" and "an unconditional commitment from Congress to compensate the Indian tribe." *Id.* at 470. A limited exception permits a finding of diminishment "[w]hen events surrounding the passage of [the statute] * * * unequivocally reveal a widely held, contemporaneous understanding that [the statute would diminish the reservation]," *id.* at 471; the statute involved in the instance cited in *Solem* for that proposition (unlike the statute at issue here) contained clear language of cession.

B. The Acts at issue here do not satisfy either requirement of the clear-statement rule articulated in *Solem*. First, they do not require unconditional compensation; rather, the compensation was limited to a share of any proceeds the United States would obtain if it was successful in disposing of the opened lands. Second, the statutes do not make any explicit reference to cession, or in any other way state that the Indians were surrendering all of their interests in the opened lands.

The only feature of the statutes that points toward a finding of diminishment is the statement in the 1902 Act that the opened lands were to be "restored to the public domain." Section 1, 32 Stat. 263. But, as the Court in *Solem* explained, such a reference is not sufficient to justify a finding of diminishment, because it could simply mean that the lands in question were returned to the public domain in the sense that they became available for non-Indian settlement; the language does not expressly indicate that the lands were to be removed from the Reservation. See *Solem*, 465 U.S. at 475 n.17. Moreover, even if such a reference might in some circumstances be adequate to justify a finding of diminishment, it would not suffice here because it was included only in the 1902 Act, not the 1905 Act under which the unallotted lands on the Uintah Indian Reservation actually were opened to settlement.

C. This case does not involve the type of widely held understanding that would justify finding a reservation

diminished even though the statute does not satisfy both aspects of the clear-statement rule articulated in *Solem*. Because only Congress has the power to alter the boundaries of a reservation, the only understanding that should suffice is an understanding shared by Congress and the affected Indians. In this case, there is no basis for supposing that the Indians understood the 1905 Act would alter the boundaries of the Reservation, nor is there any explicit statement in the legislative history that the 1905 Act would have that effect. Accordingly, there is no basis for further investigation of secondary materials. In any event, because those materials are rife with inconsistency and contradiction, they cannot "unequivocally" reveal a widely held understanding sufficient to diminish the Reservation. *Solem*, 465 U.S. at 471.

ARGUMENT

THE UINTAH INDIAN RESERVATION WAS NOT DIMINISHED BY THE 1905 ACT OR ITS 1902 PREDECESSOR

A. A Reservation Is Diminished Only When Congress Enacts A Statute Using Unambiguous Language Of Cession, And Either Congress Grants Unconditional Compensation To The Indians, Or There Is An Unequivocal And Widely Held Contemporaneous Understanding That The Reservation Is Diminished

Like several of this Court's previous cases, the present controversy turns on the effect of a surplus land Act opening an Indian reservation to settlement by non-Indians. The Congress that passed that Act (and others like it) no doubt anticipated the eventual demise of the reservation system. But the Court has "never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act. Rather, it is settled law that some surplus

land acts diminished reservations,[11] and other surplus land Acts did not.[12]'" *Solem* v. *Bartlett*, 465 U.S. 463, 468-469 (1984) (citations omitted).[13] As explained in *Solem*, the Court's prior decisions have established a "fairly clean analytical structure" for distinguishing those surplus land Acts that of their own force effected an immediate diminishment of the reservation from those that permitted non-Indians to purchase land within an existing reservation and left to another day the actual redrawing of its boundaries. *Id.* at 470.

The "first and governing principle" is that "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470. The dispositive question, then, is whether "Congress [has] clearly evince[d] an intent to change boundaries." *Ibid.* (internal quotation marks,

[11] See, *e.g.*, *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977); *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975).

[12] See, *e.g.*, *Mattz* v. *Arnett*, 412 U.S. 481 (1973); *Seymour* v. *Superintendent*, 368 U.S. 351 (1962).

[13] As the Court noted in *Solem*, the precise location of reservation boundaries "seemed unimportant" at the time the surplus land Acts were passed. 465 U.S. at 468. Until 1913, Indian title, not the reservation boundary, generally determined which sovereign had jurisdiction over a particular tract of land. See, *e.g.*, *Bates* v. *Clark*, 95 U.S. 204, 208-209 (1877); *Ex parte Crow Dog*, 109 U.S. 556, 560-462 (1883). In 1913, however, this Court initiated an expansion of the judicial definition of Indian country to include lands that had been reserved and set apart as an Indian reservation by Executive Order, even though they were not owned by Indians. *Donnelly* v. *United States*, 228 U.S. 243, 268-269 (1913). The expansion culminated in 1948, when Congress enacted a statutory definition of Indian country that includes lands held in fee by non-Indians within reservation boundaries. Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. 1151(a)); see generally *Solem*, 465 U.S. at 468 (summarizing the expansion of the concept of Indian country).

ellipses, and citation omitted). The most probative evidence bearing on that question is the statutory language used to open the reservation. Language that "[e]xplicit[ly] refer[s] to cession" or otherwise "evidenc[es] the present and total surrender of all tribal interests" in the opened area suggests that Congress meant to sever it from the reservation. *Ibid.* When such language is buttressed by an unconditional commitment to compensate the tribe, "there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Id.* at 470-471.[14]

Cession language and unconditional compensation are not, however, absolute prerequisites to a finding of diminishment. As explained in *Solem*, "[w]hen events surrounding the passage of a surplus land Act * * * unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," the Court has inferred that Congress shared that understanding and intended to diminish the reservation. *Solem*, 465 U.S. at 471. That portion of the *Solem* opinion was explaining the holding in *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977).[15] In that case, the Court concluded that a reservation had been diminished by a statute that, although it contained language of cession, did not offer payment to the Indians of a sum certain as compensation; the *Rosebud* Court relied heavily on the fact that the statute

[14] In the presence of both of those factors, the Court found a reservation to have been extinguished in *DeCoteau* v. *District County Court*, 420 U.S. 425, 431-449 (1975). In the presence of neither factor, the Court found reservations not to have been diminished in *Solem*, 465 U.S. at 472-476; *Mattz* v. *Arnett*, 412 U.S. 481, 494-505 (1973); and *Seymour* v. *Superintendent*, 368 U.S. 351, 355-356 (1962).

[15] See *Solem*, 465 U.S. at 471 (stating that "our opinion in *Rosebud Sioux Tribe* demonstrates" the accuracy of the discussion at hand).

was designed to implement an agreement with the Indians that used language of cession and indisputably provided for diminishment of the reservation. See *id.* at 591-595. The *Solem* Court made clear, however, that the holding in *Rosebud* was not to be given broad application, emphasizing that "[t]here are * * * limits to how far [the Court] will go to decipher Congress' intention in any particular surplus land Act,"—limits that require "substantial and compelling evidence of a congressional intention" to diminish in order to justify a ruling that a reservation has been diminished. 465 U.S. at 472. That requirement is consistent with the general rule that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *South Dakota* v. *Bourland*, No. 91-2051 (June 14, 1993), slip op. 7 (quoting *County of Yakima* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 693 (1992)).

B. Neither The 1905 Act Nor Its 1902 Predecessor Contained A Provision For Unconditional Compensation Of The Indians Or Language Of Cession

1. *The 1905 Act And The 1902 Act Did Not Provide For Payment Of A Sum Certain To The Indians*

As the Court has explained, an important indicator of congressional intent to alter reservation boundaries is the contemporaneous appropriation of funds to provide unconditional compensation—payment of a "sum certain" [16]—to the Indians for the lands being opened to settlement. See *Solem*, 465 U.S. at 470-471. Neither the 1905 Act nor the predecessor 1902 Act providing for the opening of unallotted lands on the Uintah Indian Reservation furnished unconditional compensation to the Tribe. As mentioned above, the sole compensation offered

[16] See *Solem*, 465 U.S. at 469 n.10; *Rosebud*, 430 U.S. at 598 n.20; *DeCoteau*, 420 U.S. at 446, 448.

the Indians was to come from whatever proceeds the government might obtain from the disposition of the unallotted lands. 1905 Act, § 1, 33 Stat. 1070 (incorporating by reference the provisions for application of the proceeds in Section 1 of the 1902 Act, 32 Stat. 264).[17] Hence, the government was under no obligation to compensate the Indians at all unless it was successful in disposing of the unallotted lands.[18]

The discussion of the payment mechanism in this Court's earlier decisions makes it clear that the arrangement for the Uintah Indian Reservation was not the type of unconditional compensation or sum-certain payment that suggests an intention on the part of Congress to diminish a reservation.[19] The method of compensation

[17] That conditional payment obligation differs from the compensation later made by the United States for the forest reserve and reservoir lands discussed in note 8, *supra*. See also 32 Stat. 264 (provision of the 1902 Act providing that $70,064.48 was "to be paid to the Uintah and White River Utes" to cover various claims of the Indians against the United States, if those Indians consented to the allotment described in the 1902 Act).

[18] The legislative history suggests that Congress clearly understood the difference between the two modes of payment, and understood that the Indians had a strong preference for unconditional compensation. The Commissioner of Indian Affairs testified at a hearing before the Senate Committee on Indian Affairs:

> It will make a great difference in negotiating with [the Indians on the Uintah Indian Reservation] whether you propose to pay a cash amount or pay them as the land is sold. The system of paying the Indians for land as it is being sold has not proved the success it was hoped it would be. The Indians are afraid of it. But, generally speaking, the Indians will under certain conditions consent to sell their land if they are paid a cash sum.

S. Doc. No. 212, 57th Cong., 1st Sess. 5 (1902).

[19] See *Solem*, 465 U.S. at 469 n.10 (describing statute at issue in *Seymour* v. *Superintendent*, 368 U.S. 351, 356 (1962), under which "the Colville Tribe received whatever proceeds these sales generated, rather than a sum certain"); *ibid.* (distinguishing

closely resembles the arrangements under the statutes that were found not to have effected a diminishment in *Solem*, 465 U.S. at 473; *Mattz* v. *Arnett*, 412 U.S. 481, 495 (1973); and *Seymour* v. *Superintendent*, 368 U.S. 351, 355-356 (1962). See *DeCoteau* v. *District County Court*, 420 U.S. 425, 447-449 (1975) (discussing that aspect of *Mattz* and *Seymour*).[20] Accordingly, the lack of unconditional compensation suggests that neither the 1905 Act nor its 1902 predecessor altered the boundaries of the Uintah Indian Reservation.[21]

2. *Neither the 1905 Act Nor Its 1902 Predecessor Contained Language Of Cession*

a. *The Act of March 3, 1905.*—Analysis of the relevant statutory language begins with the 1905 Act, the statute under which President Roosevelt opened a portion

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between "sum-certain payment" and "a provision guaranteeing the Tribe only the proceeds from the sale of the opened lands"); *DeCoteau*, 420 U.S. at 448 (describing "contrast" between agreement providing for "a sum certain" and agreement that "benefited the tribe only indirectly, by establishing a fund dependent on uncertain future sales of its land to settlers"); *ibid.* (describing contrast between statute that "provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefits" and "a straightforward agreement ceding lands to the Government for a sum certain").

[20] A statute involving a similar conditional compensation arrangement was found adequate to diminish a reservation in *Rosebud*. But the statute at issue in *Rosebud* contained explicit language of cession and, as *Solem* explains, further rested on the existence of a "widely held, contemporaneous understanding" sufficient to justify diminishment even where the statute itself did not satisfy the normal requirements for a finding of congressional intent to diminish. 465 U.S. at 471-472. We discuss *Rosebud* at length in Point C, *infra*.

[21] Cf. *Ash Sheep Company* v. *United States*, 252 U.S. 159, 164-166 (1920) (Indians retain equitable interest in lands ceded to United States where United States undertook to sell lands for benefit of the Indians).

of the Reservation to non-Indian settlement. It was in the 1905 Act that Congress specified "the manner of opening [unallotted] lands for settlement and entry, and for disposing of the same." Section 1, 33 Stat. 1069. In particular, the 1905 Act provided that the "unallotted lands on the Uintah Reservation * * * shall be disposed of under the general provisions of the homestead and town-site laws of the United States." *Ibid.* That language does not refer to a "cession" or otherwise "evidenc[e] the present and total surrender of all tribal interests" in the opened lands. *Solem*, 465 U.S. at 470. Rather, it closely resembles the language of the statutes at issue in *Solem*, *Seymour*, and *Mattz*.[22] As a unanimous Court explained in each of those cases, such statutes did not terminate the reservation, but merely "open[ed] the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Seymour*, 368 U.S. at 356 (quoted in *Mattz*, 412 U.S. at 497, and in *Solem*, 465 U.S. at 473).

The operative language here and in those cases contrasts sharply with that of the statutes at issue in *DeCoteau* and *Rosebud*, the two recent cases in which the Court has found that reservation boundaries were altered by Congress. See *DeCoteau*, 420 U.S. at 445 (statute

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[22] See Act of June 17, 1892, ch. 120, 27 Stat. 52 (Act at issue in *Mattz*, providing that excess lands were "subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands"); Act of Mar. 22, 1906, ch. 1126, § 3, 34 Stat. 81 (Act at issue in *Seymour*, providing that excess lands "shall be open to settlement and entry under the provisions of the homestead laws"); Act of May 29, 1908, ch. 218, § 2, 35 Stat. 461 (Act at issue in *Solem*, providing for the disposition of unallotted lands under the "general provisions of the homestead and town-site laws of the United States").

provided that the Indians did "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands," Act of Mar. 3, 1891, ch. 543, 26 Stat. 1036); *Rosebud*, 430 U.S. at 596-597 (statute provided that Indians did "hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted," Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254). In sum, the 1905 Act contains neither an "[e]xplicit reference to cession" nor any other "language evidencing the present and total surrender of all tribal interests" in the portion of the Reservation opened to non-Indian settlement. Accordingly, under *Solem*, it fails to demonstrate a clear congressional intention to alter the boundaries of the Uintah Indian Reservation.

b. *The Act of May 27, 1902.*—The 1902 Act likewise does not contain language demonstrating that Congress provided for the total surrender of all tribal interests in the portions of the Reservation that were opened to non-Indian settlement. Like the 1905 Act, the 1902 Act does not refer to any cession, sale, extinguishment, or conveyance of tribal lands.

The 1902 Act did state that unallotted lands eventually would "be restored to the public domain." Section 1, 32 Stat. 263. As the Court explained in *Solem*, a statement that lands have been restored to the public domain can point in the direction of diminishment, on the understanding that lands set aside in a reservation are, in some sense, removed from the public domain. Indeed, the 1902 Act's reference to "restor[ation] to the public domain" was the principal basis for the decision of the Utah Supreme Court in *Perank*, Resp. App. 20a-28a, on which that court relied in this case. In our view, however, the Utah Supreme Court gave insufficient deference to this Court's decision in *Solem*, the most recent occasion on which this Court considered the effect of a statute referring to a res-

toration of reservation lands to the public domain.[23] In *Solem*, the Court characterized such a reference as "hardly dispositive," noting that "even without diminishment, unallotted opened lands could be conceived of as being in the 'public domain' inasmuch as they were available for settlement." 465 U.S. at 475 & n.17;[24] see also *Newhall*

[23] The Utah Supreme Court in *Perank* also relied on passages in this Court's opinions in *Seymour* and *Rosebud*. Resp. App. 20a-21a. Neither passage was related directly to the issues before the Court in those cases. In any event, even if they are taken at face value, neither reference would shed much light on the statute at issue here. First, the Court in *Seymour* referred in passing to a statute not at issue in the case, which had "vacated and restored to the public domain" a portion of the reservation at issue. 368 U.S. at 354 (quoting Act of July 1, 1892, ch. 140, § 1, 27 Stat. 63). The Court implicitly assumed that the 1892 Act had diminished the boundaries of the reservation. That comment does not shed much light on the meaning of the 1905 Act, which does not use the term "vacated," a term that expresses a concept of extinguishment completely absent from the language at issue here.

Similarly, the *Rosebud* Court accepted the parties' understanding that the Act of March 2, 1889, ch. 405, § 21, 25 Stat. 896, terminated a portion of the Great Sioux Reservation by providing that it was "restored to the public domain." 430 U.S. at 589 & n.5. As the Court noted, however, that termination was accomplished with the agreement of three-fourths of the adult male Indians on the Reservation, as required by the treaty between the United States and the Sioux Nation. See *ibid.* If diminishment were found here, it would have occurred without the consent of the Indians. Moreover, the overall thrust of the 1889 Act concerning the Great Sioux Reservation, as set forth in its title, was to divide the Reservation "into separate reservations and to secure the relinquishment of the Indian title to the remainder," 25 Stat. 888 (see *Hodel* v. *Irving*, 481 U.S. 704, 706 (1987)), and the land restored to the public domain was that lying "outside of the separate reservations," § 21, 25 Stat. 896. The substitution of six smaller reservations for the single Great Sioux Reservation, and the assignment of individual Sioux members to one of the six reservations (see §§ 1-6, 16), was the functional equivalent of the cession of the remainder.

[24] Significantly, the "public domain" argument rejected by the Court in *Solem* was advanced not only by the petitioner in that case, but also by the Counties of Duchesne and Uintah, Utah, which

v. *Sanger*, 92 U.S. 761, 763 (1876) ("The words 'public lands' are habitually used * * * to describe such as are subject to sale or other disposal under general laws.").[25]

Moreover, even if a reference to the "public domain" might in some circumstances be sufficient to justify a finding of diminishment, Congress's omission of that phrase from the 1905 Act makes it particularly inappropriate to place significant weight on the reference in this case. As discussed above, the 1902 Act—in which the only reference to the "public domain" appears—conditioned implementation on the consent of the Indians. Section 1, 32 Stat. 263-264. Despite several extensions, that consent was not forthcoming. Notwithstanding the absence of consent, Congress finally provided in the 1905 Act for the allotment and subsequent opening of surplus lands to non-Indian settlement. Significantly, however, the 1905 Act, under which the Reservation was opened, did not carry forward the 1902 Act's reference to the "public domain"; instead, the 1905 Act itself specified "the manner of opening [unallotted] lands for settlement and entry," substituting a more detailed statement that the lands would be "disposed of under the general provisions of the homestead and town-site laws of the United States." Compare 1902 Act, § 1, 32 Stat. 263, with 1905 Act,

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appeared as amici, presumably because of the reference to the public domain in the 1902 Act concerning the Uintah Reservation. See 465 U.S. at 475 n.16.

[25] Cf. *Utah Division of State Lands* v. *United States*, 482 U.S. 193, 206 (1987); *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531, 548-549 n.15 (1987). In evaluating the significance of a reference to lands being in the "public domain," it is important to recall that at the time the statute containing that reference was enacted, the question whether the opened lands continued to be a portion of the reservation would have had little practical significance; it would not, for example, have affected criminal jurisdiction. See note 13, *supra*.

§ 1, 33 Stat. 1069.[26] As in earlier cases in which Congress failed to enact bills that more clearly suggested an intent to diminish or disestablish a reservation, Congress's abandonment of the public domain language suggests that any effort "to terminate the reservation * * * failed completely." *Mattz*, 412 U.S. at 504.[27]

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[26] The differences between the two statutes are not limited to the deletion of the reference to the "public domain." Under the 1902 Act, Congress provided that "*all the unallotted lands* within said reservation *shall be restored to the public domain.*" 32 Stat. 263 (emphasis supplied). The 1905 Act, by contrast, provided more generally that the "unallotted lands [except for mineral lands and lands for a forest reserve] shall be disposed of [under the homestead laws] and shall be opened to settlement and entry by proclamation of the President," 33 Stat. 1069, and also authorized the President to set aside lands "necessary to conserve and protect the water supply for the Indians or for general agricultural development," 33 Stat. 1070.

[27] The proposition that Congress retreated in the face of continued opposition on the part of the Ute Indians on the Uintah Indian Reservation is supported by Congress's continued efforts to gain that consent over a period of several years. See S. Doc. No. 212, 57th Cong., 1st Sess. 4 (1902) (statement of Commissioner of Indian Affairs at congressional hearing of his "understand[ing] that there is a treaty arrangement with those Indians which will make it necessary for you to treat with them before it can be thrown open to settlement"); see *id.* at 5 (discussing failure of previous negotiations). Those persistent negotiating efforts contrast favorably with Congress's treatment of the neighboring Uncompahgre Indians, with respect to whom Congress—in the same statute that appointed the first commission to seek consent from the Ute Indians—authorized unilateral and immediate allotment. See Act of Aug. 15, 1894, ch. 290, § 20, 28 Stat. 337-338. As a contemporary House Report explained, the difference in treatment rested on Congress's view that the Uncompahgres had only "the privilege of temporary occupancy," while the Uintah Reservation Indians were "the owners of the lands within the reservation, because * * * it was provided that the lands within the Uintah Reservation should be 'set apart for the permanent settlement and exclusive occupation of the Indians.'" H.R. Rep. No. 660, 53d

At bottom the Utah Supreme Court's analysis rests on the conclusion that the 1905 Act evidenced an intent to diminish the Uintah Indian Reservation by implicitly incorporating a phrase from the 1902 Act. Given the omission of that phrase from the 1905 Act, the failure of the conditions on which the 1902 Act was predicated, and the ambiguity of the phrase in the first place, the use of the phrase "public domain" in the 1902 Act fails to carry the State's burden of showing "that Congress clearly evince[d] an intent to change [the] boundaries" of the Reservation. *Solem*, 465 U.S. at 470 (internal quotation marks, ellipses, and citation omitted).[28]

C. The 1905 Act And The 1902 Act Do Not Reflect An Unequivocal And Widely Held Contemporaneous Understanding That They Would Diminish The Uintah Indian Reservation

Relying on the decision in *Rosebud*, the Court stated in *Solem* that in some cases a statute will be held to diminish or extinguish an Indian reservation even if it does not bear all of the usual marks of such a statute—express language of cession and unconditional compensation for the Indians. In the words of the *Solem* Court, that result is appropriate

Cong., 2d Sess. 1, 2-3 (1894) (quoting Act of May 5, 1864, ch. 77, § 2, 13 Stat. 63).

[28] An additional feature of the statutes that suggests they were not intended to alter the boundaries of the reservation is the absence of a specific statutory description of the land that was, in respondent's view, removed from the Reservation. In *DeCoteau* and *Rosebud*, the relevant statutes precisely described the areas that were found to have been removed from reservation status; the finding of diminishment in those cases therefore comported with the requirement that Congress itself must "clearly evince an 'intent . . . to change . . . boundaries.'" *Solem*, 465 U.S. at 470 (quoting *Rosebud*, 430 U.S. at 615). By contrast, in this case Congress did not describe the areas of the Uintah Indian Reservation that were to be opened to non-Indian settlement, but instead left it to the Executive Branch to identify such lands in the future.

> [w]hen events surrounding the passage of a surplus land Act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress—unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation.

465 U.S. at 471.

The circumstances of *Rosebud* that were held sufficient to justify diminishment illustrate the narrowness of that exception to the general rule. *Rosebud* involved an unequivocal and universally shared understanding among the participants to the transaction that the statute in question (the Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254) would diminish the boundaries of the Rosebud Sioux Reservation. In particular, it is clear that the Indians had agreed to a diminishment of the Reservation; in 1901, three-fourths of the adult male Indians on the Rosebud Sioux Reservation had executed an agreement (negotiated by Inspector James McLaughlin)[29] under which they would "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to" the land in question, in return for an unconditional payment of just over $1,000,000. See *Rosebud*, 430 U.S. at 590-591 & n.8.[30] Because Congress was unwilling to agree to outright payment for the lands, Inspector McLaughlin

[29] Interestingly, Inspector McLaughlin also conducted the unsuccessful negotiations with the Sioux Indians over the land at issue in *Solem*, see 465 U.S. at 476-477, and with the Ute Indians over the land at issue in this case, see H.R. Doc. No. 33, 58th Cong., 1st Sess. 3-7 (1923) (report by Inspector McLaughlin of unsuccessful negotiations).

[30] The applicable treaty with the Sioux Indian Nation provided that no treaty for cession of any part of its reservation would be valid without the consent of three-fourths of the adult male Indians on that reservation. See *Rosebud*, 430 U.S. at 589.

returned to that Reservation to renegotiate the agreement. See *id.* at 591-592. Although he failed to secure the consent of three-fourths of the adult male Indians, he did secure the consent of a simple majority to a 1903 agreement that—using the same language of cession as the 1901 agreement—made payment contingent upon successful sale of the land, with the compensation per acre raised from $2.50 to $2.75. See *id.* at 592-594. Congress promptly enacted a statute that set forth the 1901 agreement in its entirety, and then "accepted, ratified, and confirmed [that Agreement] as * * * amended and modified" to delete the obligation of unconditional compensation. Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254-256; see *Rosebud*, 430 U.S. at 594-597.

As the *Rosebud* Court explained, a ruling that the Rosebud Sioux Reservation was not diminished by the 1904 Act at issue there could only have frustrated congressional intent. The statute used unequivocal language of cession, and adopted an agreement of the Indians that unequivocally approved the cession (albeit with modifications approved by only a simple majority of the adult male Indians). Inspector McLaughlin advised the Indians in unambiguous language that both the 1901 and the 1903 Agreements, if enacted by Congress, would alter the boundaries of the Reservation. See *Rosebud*, 430 U.S. at 591-593. The legislative history reviewed by the Court contained "no indication that Congress intended to change anything [from the 1901 Agreement] other than the form of, and responsibility for, payment," *id.* at 594-595, and the House Report in fact flatly stated that the bill would "ratify and amend an agreement * * * providing for the cession to the United States of the unallotted portion of [the Indians'] lands," see *id.* at 595 (quoting H.R. Rep. No. 443, 58th Cong., 2d Sess. 3 (1904)).

Application of the *Rosebud* analysis to this case shows that whatever the desires of individual Members of Congress, there is no evidence—let alone unequivocal evi-

dence—of a widely held contemporaneous understanding that the opened lands would be removed from the Uintah Indian Reservation. First, there is no document in this case that establishes the "unmistakable baseline purpose of disestablishment" that was so important to the Court in *Rosebud*, 430 U.S. at 592; none of the relevant documents—the 1905 Act, the previous Acts dealing with the Reservation, or any agreement with the Indians—uses the indisputable language of cession that was a feature of all of the relevant documents in *Rosebud*. Moreover, in our view, the requirement in *Solem* that the "understanding" be "widely held" requires proof that the Indians shared in an understanding that alteration of the Reservation's boundaries was at hand; the only obvious manifestation of such an understanding on the part of the Indians is an agreement of cession, like the one approved in *Rosebud*. Because the Indians in this case steadfastly refused to consent to any alteration of the Reservation boundaries, there is no such agreement in this case.[31] Accord-

[31] Indeed, as Inspector McLaughlin explained, the Indians on the Uintah Indian Reservation firmly believed "that their reservation could not be opened to settlement without their consent," and that "they were thus advised by officials of the Department [of the Interior] during their visit to Washington." H.R. Doc. No. 33, 58th Cong., 1st Sess. 5 (1903). The view of the Indians was not entirely unreasonable, considering the date of the negotiations in question—May 1903, only four months after this Court's January 1903 decision in *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 566-568, first upheld the power of Congress to diminish a reservation unilaterally.

Given the Indians' view on that question, the Utah Supreme Court erred in relying (Resp. App. 37a) on Inspector McLaughlin's advice to the Indians that "there will be no outside boundary line to this reservation." Minutes of Council Meetings Between Inspector McLaughlin and the Ute Indians 42 (May 18-23, 1903), JX 162. ("JX" refers to the joint exhibits of the parties in *Ute Indian Tribe* v. *Utah*, 521 F. Supp. 1072 (D. Utah 1981); the parties have stipulated that the record in this case includes the record in the *Ute Indian* case, see Resp. App. 164a-165a.) In any event, the Indians' response to Inspector McLaughlin's advice was to reject

ingly, it would be inappropriate to rely on "understandings" to conclude that the Reservation was diminished.

The Utah Supreme Court's contrary conclusion rested to a considerable degree on its understanding of a variety of materials regarding the contemporaneous and subsequent understanding of the 1902 and 1905 Acts. Resp. App. 44a-61a. For two reasons, we do not believe that those materials support the decision of the court below. First, although the Court's decision in this area frequently have mentioned such materials, we believe they have at best only limited relevance. See *Solem*, 465 U.S. at 471 (noting that the Court has considered such materials relevant "[t]o a lesser extent" than the statutory text and other sources discussed above).[32] The suggestion of the *Solem* Court that a widely held, contemporaneous understanding in some cases could be sufficient to justify a finding of diminishment was not a license for the lower courts to conduct a wide-ranging investigation into the views that individual legislators and administrative officials took of legislation. Because only Congress and the Indian Tribes have the power to alter the limits of a Tribe's sovereignty, it is not appropriate to rest decisions regarding those limits on the views of third parties who could not themselves alter those limits.

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the proposal by an overwhelming margin, see note 6, *supra*. Because the allotment program under the 1902 Act was conditioned on the Indians' consent, it failed and was replaced by the program set forth in the 1905 Act, at issue here. There is no suggestion that any representative of the government advised the Indians that the 1905 Act would alter the boundaries of the Reservation.

[32] Moreover, it is not clear that such secondary materials have affected any of the Court's recent holdings in the area. As we explained in note 14, *supra*, all of the Court's recent decisions other than *Rosebud* can be explained by the bright-line rule articulated in *Solem*; and, as discussed above, *Rosebud* itself appears to rest primarily on the terms of congressional enactments and tribal agreements, rather than on the understanding other parties had of those documents.

Second, we do not believe that the historical record supports the Utah Supreme Court's view that both Congress and the Executive Branch understood the 1902 and 1905 Acts to alter the boundaries of the Uintah Indian Reservation. Rather, the historical record here, as in *Solem*, is "so rife with contradictions and inconsistencies as to be of no help to either side." 465 U.S. at 478. Most of the materials on which the Utah Supreme Court relied are ambiguous, indicating only that the land in question was to be restored to the "public domain."[33] As discussed above, such references, even in the opening statute itself, do not directly address the question at issue in this case.

To be sure, a few federal statutes enacted shortly after the 1905 Act referred to the Reservation as having been diminished by the 1902 and 1905 Acts.[34] But a number of other statutes apparently rested on the contrary assumption that the Reservation was not diminished by the 1902 and 1905 Acts.[35] Still other statutes referred to

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[33] See, *e.g.*, Resp. App. 45a-46a (President Roosevelt's Proclamations), 51a-52a (subsequent statements of officials in the Department of the Interior), 54a-55a (1971 order of the Department of the Interior), 57a-60a (subsequent judicial decisions).

[34] Act of Jan. 27, 1906, ch. 7, 34 Stat. 9 (referring to "lands which were heretofore a part of the Uintah Indian Reservation"); Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285 (referring to "lands within the ceded Uintah Indian Reservation"); Act of July 20, 1912, ch. 244, § 1, 37 Stat. 196 (referring to "land which was formerly a part of the Uintah Indian Reservation"). As the Court in *Solem* explained in a similar context, those references may well have been referring to land as having left the common lands of the Reservation, rather than having left the Reservation entirely. 465 U.S. at 475 n.17.

[35] Act of Aug. 1, 1914, ch. 222, § 21, 38 Stat. 604 (referring to "the bridge at Myton, on the Uintah Indian Reservation"); Act of Mar. 4, 1929, ch. 705, § 1, 45 Stat. 1584 (referring to "the State Experimental Farm * * * within the Uintah and Ouray Indian Reservation"); Act of Apr. 22, 1932, ch. 125, § 1, 47 Stat. 111 (same). Similarly, two statutes referred to an extension of the

the "former" Reservation, a reference that cannot be correct, because all agree that at least the allotted parcels continued to constitute a reservation.[36] Finally, on some occasions contradictory references were included in the same Act.[37] As in *Solem*, the ready availability of "ex-

"exterior boundary" of the Reservation, a reference that assumes the Reservation remained a cohesive whole including the opened lands. Act of Mar. 11, 1948, ch. 108, § 1, 62 Stat. 72; Act of Aug. 9, 1955, ch. 263, 69 Stat. 544. See generally *Ute Indian Tribe* v. *Utah*, 521 F. Supp. 1072, 1133-1134 (D. Utah 1981) (cataloguing legislative materials that assume the opened lands remain in the reservation), aff'd in relevant part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986).

An extensive number of statutes referred to the Reservation as continuing in existence. Act of Mar. 3, 1921, ch. 119, § 21, 41 Stat. 1245 (obligation to construct bridge "free from all expense to the * * * Indians of the Uintah and Ouray Reservation"); Act of Mar. 4, 1931, ch. 522, 46 Stat. 1567 (appropriation for "[i]rrigation system, Uintah Reservation"); Act of Feb. 2, 1932, ch. 12, 47 Stat. 22 (same); Act of June 19, 1934, ch. 648, § 1, 48 Stat. 1033 (same); Act of Aug. 9, 1937, ch. 570, § 1, 50 Stat. 573 (referring to funds "apportioned to the Indians of the Uintah and Ouray Reservation"); Act of Mar. 16, 1950, ch. 59, 64 Stat. 19 (referring to the "Ute Indian Tribe of the Uintah and Ouray Reservation"); Act of Aug. 21, 1951, ch. 338, §§ 1-2, 65 Stat. 194 (same); Act of Aug. 27, 1954, ch. 1009, §§ 1-2, 68 Stat. 868 (same); Act of July 14, 1956, ch. 603, §§ 1-5, 70 Stat. 546-547 (same).

[36] Act of June 21, 1906, ch. 3504, 34 Stat. 375 ("former Uintah Reservation"); Act of June 29, 1906, ch. 3599, 34 Stat. 611 ("former Uintah Indian Reservation"); Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285 ("former Uintah Reservation"); Act of May 14, 1920, ch. 187, 41 Stat. 599-600 ("former Uintah Indian Reservation"); see also Presidential Proclamation of Sept. 1, 1906, 34 Stat. 3228 (referring to the "former Uintah Indian Reservation"). Indeed, one statute referred to the "allotted lands of any Indian of the former Uintah * * * reservation," Act of Apr. 30, 1908, ch. 153, 35 Stat. 95, a reference that can make sense only on the understanding that the allotted lands had left the "reservation" in the general (though inaccurate) sense that they were no longer common lands set aside for and beneficially held by a tribe.

[37] Section 21 of the Act of Mar. 3, 1911, ch. 210, 36 Stat. 1073-1074, refers at one point to persons having made "homestead

amples pointing in both directions leave[s] one with the distinct impression that subsequent Congresses had no clear view whether the opened territories were or were not still part of the * * * Reservation." 465 U.S. at 479.[38] Given the hazards involved in attempting to infer the intent of one Congress from the views of subsequent Congresses, see *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980), the inconsistent references contribute nothing of substance to the decision of this case.

Finally, the Utah Supreme Court relied on its belief that the Department of the Interior had treated the 1902 and 1905 Acts as having diminished the Reservation. See Resp. App. 52a-56a, 57a n.27. As with the statutory materials, many of the items on which the court relied do not address the question at hand.[39] The two formal

entry for land in the Uintah Indian Reservation"—a reference that assumes the opened lands remained in the Reservation—and later on the same page refers to "the proceeds of the sale of lands within the ceded Uintah Indian Reservation"—a reference that appears to rest on the opposite assumption. Similarly, the Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285, which compensated the Indians for land set apart for reservoir purposes, see note 8, *supra*, refers to those lands as lying "in the former Uintah Indian Reservation," but later in the same paragraph states that "[a]ll right, title, and interest of the Indians in the said lands are hereby extinguished."

[38] To the extent conclusions can be drawn from the legislative record, it appears that Utah's Senators Sutherland and Smoot were the principal sources of references suggesting that the 1902 and 1905 Acts had diminished the Reservation. Such references ceased shortly after Senator Sutherland's departure from the Senate in 1917. See *Ute Indian Tribe* v. *Utah*, 521 F. Supp. 1072, 1133 (D. Utah 1981), aff'd in relevant part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986).

[39] The bulk of the materials the court cites at Resp. App. 57a n.27 do nothing more than refer incorrectly to the "former" Uintah Indian Reservation. See H.R. Rep. No. 5010, 59th Cong., 1st Sess. 1-2 (1906); Letter from C.F. Darrabee, Acting Commissioner of

notices of the Secretary on which the court relied are as ambiguous as much of the statutory material, although on balance they seem to support our understanding.[40] To be sure, some of the items do include statements by lower level officials in the Department of the Interior indicating that the lands opened to non-Indian settlement under the 1905 Act were removed from the Reservation.[41] But, in

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Indian Affairs, to H.C. Means (Sept. 26, 1907), JX 336; Letter from First Assistant Secretary of the Department of the Interior to Commissioner of Indian Affairs (Nov. 8, 1907), JX 338; Letter from Secretary of the Department of the Interior to Secretary of the Treasury (Dec. 19, 1908), JX 341. Moreover, given the limited information contained in those documents, it is difficult to ascertain whether the documents involved portions of the Reservation that were opened to settlement under the 1905 Act, rather than land that might have been affected by one of the other actions Congress had taken with respect to the Reservation.

[40] Although the 1945 Order Notice, 10 Fed. Reg. 12,409, discussed at length at Resp. App. 52a-54a, does state at one point that the lands not sold pursuant to the 1902 and 1905 Acts should be "added to and made a part of the existing reservation," at an earlier point it describes those lands as "lands which are now or may hereafter be classified as undisposed-of opened lands *of the Uintah and Ouray Reservation.*" *Ibid.* (emphasis added). The latter reference rests on the assumption that the lands in question had never been severed from the Reservation. Similarly, the 1971 Order Notice, 36 Fed. Reg. 19,920, states that the lands in question "were restored to the public domain"; it does not state that they were severed from the Reservation. Indeed, the notice refers at another point to "the undisposed-of opened lands of said reservation" being "restored to tribal ownership," suggesting that the opening of the lands had altered ownership but not severed the lands from the Reservation. *Ibid.* For a similar reference, see Commissioner of Indian Affairs, *Annual Report* 44 (1918), JX 394 (referring to "areas of unallotted land within this reservation" that had been opened to homestead entry).

[41] 1929 Annual Report of Uintah and Ouray Agent 1, JX 420; 1931 Annual Report of Uintah and Ouray Agent 4-6, JX 425; 1932 Annual Report of Uintah and Ouray Agent 1-2, JX 427; Bureau of Indian Affairs, Phoenix Area Office, *Information Profiles of Indian Reservations in Arizona, Nevada, & Utah* 151, 155 (1976), JX 480.

light of the inconsistent practice of Congress and the Secretary, there is no basis for relying on those statements to provide a definitive resolution of the question against the Tribe.

* * * *

At bottom, the 1902 and 1905 Acts do not contain the clear expression of intent to change the Reservation's boundaries that this Court's cases have required. Nor can the State establish the type of widely shared understanding of the effect of those Acts that would justify treating the Acts as going farther than the terms Congress chose to express its action. The Tribe consistently refused to consent to any alteration of the Reservation's boundaries, and Congress never adopted any statute explicitly attempting to alter the boundaries unilaterally. Accordingly, this Court should hold that the Reservation was not diminished by the provisions of the 1905 Act, and its 1902 predecessor, that opened portions of the Reservation to non-Indian settlement.

CONCLUSION

The judgment of the Supreme Court of Utah should be reversed.

Respectfully submitted.

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APPENDIX

1. The Act of May 27, 1902, ch. 888, § 1, 32 Stat. 263-264, provided, in relevant part:

> That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: *Provided,* That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre * * *; and the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians.

2. The Act of Mar. 3, 1905, ch. 1479, § 1, 33 Stat. 1069-1070, provides, in relevant part:

> That the time for opening to public entry the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the tenth day of March, nineteen hundred and five, it is hereby provided that the time for opening said reservation shall be extended to the first of September, nineteen hundred and five, unless the President shall determine that the same may be opened at an earlier date and that the

manner of opening such lands for settlement and entry, and for disposing of the same, shall be as follows: That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the Act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of such lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry * * * *And provided further,* That all lands opened to settlement and entry under this Act remaining undisposed of at the expiration of five years from the taking effect of this Act shall be sold and disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than six hundred and forty acres to any one person. The proceeds of the sale of such lands shall be applied as provided in the Act of Congress of May twenty-seventh, nineteen hundred and two, and the Acts amendatory thereof and supplemental thereto.

That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the Act of Congress of May twenty-seventh, nineteen hundred and two[, ch. 888, § 1, 32 Stat. 263], such portion of the lands within

the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued.

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